

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>RED ARROW PRODUCTS COMPANY</b>	)	<b>Docket No. 5-CAA-97-002</b>
<b>Manitowoc, Wisconsin</b>	)	
	)	<b>Proceeding to Assess</b>
	)	<b>Administrative Penalty</b>
	)	<b>under Section 113(d) of the</b>
<b>Respondent.</b>	)	<b>Clean Air Act</b>
<hr/>	)	<b>42 U.S.C. § 7413(d)</b>

**ANSWER AND REQUEST FOR HEARING**

Red Arrow Products Company ("Red Arrow"), by and through its attorneys, DeWitt Ross & Stevens S.C., answers and/or otherwise responds to the Complaint of the United States Environmental Protection Agency ("EPA" or "Complainant") dated January 17, 1997 and demands a full adjudicatory hearing affording all due process rights on the same as follows:

**ANSWER**

1. As to the allegations contained in Paragraph 1 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

2. As to the allegations contained in Paragraph 2 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant to its proof thereon; furthermore, whether Wisconsin Regulation NR 154.11 became part of the Wisconsin federally enforceable State Implementation Plan constitutes a conclusion of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow admits that on or about March 9, 1983, the Complainant allegedly approved certain Wisconsin regulations pursuant to its authority

under the Clean Air Act and such action was published at 48 Fed. Reg. 9,860 but Red Arrow lacks sufficient knowledge or information to form a belief as to whether such approval was proper or has since been modified, amended or revoked; furthermore, Red Arrow affirmatively alleges that Wis. Admin. Code NR 154.11 is not a requirement of the Wisconsin Implementation Plan.

3. As to the allegations contained in Paragraph 3 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

4. As to the allegations contained in Paragraph 4 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

5. As to the allegations contained in Paragraph 5 of the Complaint, Red Arrow incorporates by reference its responses, admissions, denials and allegations contained in Paragraphs 1 through 4 of this Answer as if fully set forth herein.

6. Red Arrow denies the allegations of Paragraph 6. Red Arrow states that the correct corporate name is Red Arrow Products Company, Inc.

7. Red Arrow denies the allegations of Paragraph 7. As indicated in Paragraph 6, the correct name of the respondent is Red Arrow Products Company, Inc. The Red Arrow Products Company, Inc. is a Wisconsin corporation whose main offices are located at 633 South Twentieth Street, Manitowoc, Wisconsin. Red Arrow Products Company, Inc. has a place of business located at 1226 South Water Street, Manitowoc, Wisconsin.

8. As to the allegations contained in Paragraph 8 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

9. As to the allegations contained in Paragraph 9 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; Red Arrow admits that it operates a facility located at 1226 South Water Street, Manitowoc, Wisconsin at which it operates a saw dust dryer which it has designated as process PO1.

10. As to the allegations contained in Paragraph 10 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

11. As to the allegations contained in Paragraph 11 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow admits that construction on the sawdust dryer it has designated as source "PO1" was commenced after April 1, 1972.

12. As to the allegations contained in Paragraph 12 of the Complaint, Red Arrow admits that it received a document from Complainant dated July 24, 1996, entitled Notice of Violation, Red Arrow further alleges such document speaks for itself.

13. As to the allegations contained in Paragraph 13 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; furthermore, Red Arrow affirmatively alleges that the Wisconsin Department of Natural Resources ("WDNR") has

been delegated primary authority to enforce air pollution control laws within the state of Wisconsin and that the WDNR has previously investigated the factual circumstances and allegations described in this Complaint and on information and belief Red Arrow believes the WDNR concluded that it would be substantially unjust, arbitrary and capricious, unwarranted, unreasonable and/or otherwise improper to pursue enforcement action for the alleged activity and that civil penalties would be inappropriate for the activity alleged in the Complaint.

### COUNT I

14. As to the allegations contained in Paragraph 14 of the Complaint, Red Arrow incorporates by reference its responses, admissions, denials and allegations contained in Paragraphs 1 through 13 of this Answer as if fully set forth herein.

15. As to the allegations contained in Paragraph 15 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same. Red Arrow affirmatively alleges that the Ringelmann Chart has been generally criticized as inaccurate for measuring opacity, and further alleges that it has a steam plume which further affects the accuracy of such readings.

16. As to the allegations contained in Paragraphs 16 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon.

17. As to the allegations contained in Paragraphs 17 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; furthermore, Red Arrow

affirmatively alleges that the Ringelmann Chart has been generally criticized as inaccurate for measuring opacity.

18. As to the allegations contained in Paragraph 18 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same. Red Arrow further alleges that it is not subject to the 20 percent opacity limitation alleged in Paragraph 18.

19. As to the allegations contained in Paragraph 19 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

20. As to the allegations contained in Paragraph 20 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; furthermore, Red Arrow affirmatively alleges that no civil penalty should be imposed upon it for the activities alleged in the Complaint; furthermore, the proposed penalty of \$80,700 exceeds the maximum civil penalty allowed under the Clean Air Act and under applicable agency rules, guidance and policies.

21. As to the allegations contained in Paragraph 21 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; however, Red Arrow admits that a document entitled "Clean Air Act Stationary Source Civil Penalty Policy" accompanied the Complaint in this matter.

22. As to the allegations contained in Paragraph 22 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; furthermore, Paragraph 22 attempts to characterize and paraphrase a document entitled "Clean Air Act Stationary Civil Penalty Policy", while such document speaks for itself.

23. As to the allegations contained in Paragraph 23 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; furthermore, Red Arrow affirmatively alleges that none of the activities alleged in the Complaint could result in "actual or possible harm" as alleged therein, and that the proposed penalty exceeds statutory authority and applicable agency regulations, guidance and policy. Red Arrow further alleges that the alleged standard does not apply to it.

24. As to the allegations contained in Paragraph 24 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; however, Red Arrow admits that its facility located at 1226 South Water Street, Manitowoc, Wisconsin is located in an area currently designated as "attainment" for particulate; furthermore, Red Arrow affirmatively asserts that the activities alleged in the Complaint do not warrant increasing the proposed penalty due to the alleged "sensitivity to the environment" and the proposed penalty exceeds statutory authority and agency regulations, guidance and policy.

25. As to the allegations contained in Paragraph 25 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon.

26. As to the allegations contained in Paragraph 26 of the Complaint, Red Arrow lacks sufficient information or knowledge to form a belief as to the same, and therefore denies the same and puts Complainant on its proof thereon; however, Red Arrow affirmatively alleges that it cooperates with all regulatory agencies, including the WDNR and EPA, and has acted in good faith in all respects; furthermore, Red Arrow admits installing a control device on its sawdust dryer designated as "PO1", and that such control device controls, among other things, particulate emissions.

27. As to the allegations contained in Paragraph 27 of the Complaint, Red Arrow denies the same.

28. As to the allegations contained in Paragraph 28 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow affirmatively requests a hearing to contest material facts alleged in the Complaint and/or to contest the amount of the proposed penalty.

29. As to the allegations contained in Paragraph 29 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow affirmatively alleges that a document entitled "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits" accompanied the Complaint.

30. As to the allegations contained in Paragraph 30 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow admits that it has sent a copy of this Answer to the individuals designated in Paragraphs 30 and 33.

31. As to the allegations contained in Paragraph 31 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

32. As to the allegations contained in Paragraph 32 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

33. As to the allegations contained in Paragraph 33 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow admits that it has sent a copy of this Answer to the individual designated in Paragraphs 30 and 33.

34. As to the allegations contained in Paragraph 34 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

35. As to the allegations contained in Paragraph 35 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same.

36. As to the allegations contained in Paragraph 36 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow

denies the same; however, Red Arrow affirmatively alleges that it has requested an informal conference to discuss the facts of this action and to arrive at a settlement, such request having been sent to the person designated in Paragraph 36.

37. As to the allegations contained in Paragraph 37 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow affirmatively alleges that it has requested an informal conference to discuss the facts of this action and to arrive at a settlement, such request having been sent to the person designated in Paragraph 36.

38. As to the allegations contained in Paragraph 38 of the Complaint, such allegations constitute conclusions of law which need not be answered, therefore Red Arrow denies the same; however, Red Arrow affirmatively alleges that it has requested an informal conference to discuss the facts of this action and to arrive at a settlement, such request having been sent to the person designated in Paragraph 36.

#### **FIRST AFFIRMATIVE DEFENSE**

The WDNR has been delegated primary authority to enforce air pollution control laws within the state of Wisconsin. The WDNR has previously investigated the factual circumstances and allegations described in this Complaint and concluded that it would be substantially unjust, arbitrary and capricious, unwarranted, unreasonable and/or otherwise improper to pursue enforcement actions and proposed penalties for the same.

## **SECOND AFFIRMATIVE DEFENSE**

WDNR has been delegated primary enforcement authority over the factual allegations described in this Complaint. Terms and conditions in that delegation preclude the EPA from attempting to prosecute the allegations contained in the Complaint.

## **THIRD AFFIRMATIVE DEFENSE**

Complainant is selectively enforcing Clean Air Act requirements and regulations against Red Arrow in an unlawful manner.

## **FOURTH AFFIRMATIVE DEFENSE**

Under the circumstances here presented, no penalty should be imposed upon Red Arrow.

## **FIFTH AFFIRMATIVE DEFENSE**

Complainant fails to state a claim upon which relief can be granted.

## **SIXTH AFFIRMATIVE DEFENSE**

The allegations in the Complaint are barred by the doctrines of *res judicata* and/or collateral estoppel.

## **SEVENTH AFFIRMATIVE DEFENSE**

The claims asserted against Red Arrow are barred in whole, or in part, by the doctrines of laches or waiver.

## **EIGHTH AFFIRMATIVE DEFENSE**

The factual allegations and assertions in the Complaint are, upon information and belief, based solely upon activities undertaken and observed by WDNR representatives. Because the alleged violations involved purely subjective standards for which EPA performed

no first hand investigations, EPA has no substantial justification for pursuing the claims asserted against Red Arrow in the Complaint.

**NINTH AFFIRMATIVE DEFENSE**

Complainant lacks standing to bring this Complaint against Red Arrow.

**TENTH AFFIRMATIVE DEFENSE**

Complainant lacks jurisdiction over this matter.

**ELEVENTH AFFIRMATIVE DEFENSE**

To the extent testing performed by agency personnel, or agents, suggest an exceedance of applicable opacity standards, such results are attributed to testing anomalies, shortcomings inherent in the testing methodology, the non-representative nature of the emissions analyzed and/or the subjective nature of opacity testing.

**TWELFTH AFFIRMATIVE DEFENSE**

The penalties sought by EPA exceeds statutory authority, applicable agency rules, guidance and/or policy.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Complainant failed to inform Red Arrow that, if opacity requirements could not be met, Red Arrow has the right to petition for an appropriate adjustment to the opacity standard applicable to Red Arrow. The filing of this Complaint, prior to Complainant providing such notice, is contrary to applicable regulations, legal precedent and EPA guidance documents.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

Visible emissions of the type alleged in this Complaint do not affect interstate commerce and therefore are not within the EPA's jurisdiction.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

Any opacity observed was due to the presence of uncombined water vapor and is therefore not a violation of the relevant standard.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

The provisions of NR 154.11(6)(e) do not apply to the operations of Red Arrow.

#### **SEVENTEENTH AFFIRMATIVE DEFENSE**

Wisconsin Regulation NR 154.11 is not a requirement of the Wisconsin Implementation Plan and has not been listed as a requirement of the Wisconsin Implementation Plan pursuant to 42 U.S.C. § 7410(h)(1).

To the extent the Complaint has not described the allegations against Red Arrow with sufficient particularity to enable Respondents to determine all of its applicable defenses, Red Arrow hereby reserves its right to assert any and all additional defenses once the precise nature of those allegations are asserted.

THEREFORE, Red Arrow requests the dismissal of the Complaint in its entirety with prejudice, and to grant such other and further relief as is deemed just and proper, together with the costs and disbursements of this action, along with fees and other expenses pursuant to 5 U.S.C. § 504 and/or 28 U.S.C. § 2412.

### REQUEST FOR HEARING

Pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), and in accordance with the Administrative Procedures Act, 5 U.S.C. § 551 et seq., Red Arrow demands the right to a fully contested adjudicatory hearing regarding the Complaint to contest material facts alleged in the Complaint and to contest the appropriateness and/or amount of the proposed penalty.

The above answer indicates the circumstances that Red Arrow, at the present time, alleges as grounds for defense of the same and the facts that it intends to place at issue.

Dated this 21st day of February, 1997.

Respectfully submitted,

DEWITT ROSS & STEVENS s.c.

By: 

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608-255-8891  
Attorneys for Respondent

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF: )

RED ARROW PRODUCTS COMPANY )  
Manitowoc, Wisconsin )

Respondent. )  
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Docket No. 5-CAA-97-002

Proceeding to Assess  
Administrative Penalty  
under Section 113(d) of the  
Clean Air Act  
42 U.S.C. § 7413(d)

CERTIFICATE OF SERVICE

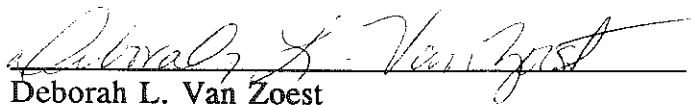
STATE OF WISCONSIN )

) ss.

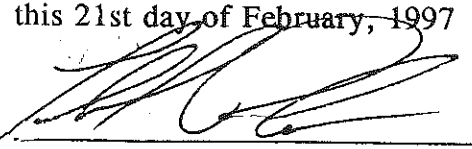
COUNTY OF DANE )

Deborah L. Van Zoest, being first duly sworn, on oath deposes and states that she is an employee with the law firm of DeWitt Ross & Stevens S.C., attorneys for the above-named respondent; that on the 21st day of February, 1997, she served a true and correct copy of the within Answer and Request for Hearing along with a request for informal conference by United States Certified Mail, to the following named at the address stated, to-wit:

Regional Hearing Clerk (R-19J)  
United States Environmental Protection Agency  
Region V  
77 West Jackson Boulevard  
Chicago, IL 60604

  
Deborah L. Van Zoest

Subscribed and sworn to before me  
this 21st day of February, 1997

  
\_\_\_\_\_  
Notary Public, State of Wisconsin  
My commission expires: *n/a*